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No. 07-663

In The
Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE,

Petitioners,

v.

JOHN D. WEST, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE AND OF THE ISSUES

Respondents respectfully submit that AK Steel has not accurately stated the facts, the issues decided below, and the lower courts' conclusions on those issues.

AK Steel repeatedly asserts that this case involves a claim for "statutory violation of ERISA," and not a claim for benefits due under the terms of the AK Steel Pension Plan. *See* Petition at 1, 7, 10. AK Steel thus mischaracterizes the decision below as holding that "a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B)[, 29 U.S.C. § 1132(a)(1)(B)]." Petition at Questions Presented. On these assertions, AK Steel builds its argument that the Sixth Circuit's opinion in this case is in conflict with decisions of other circuits on the scope of ERISA § 502(a)(1)(B). But the assertions are false. To the Sixth Circuit, the "key issue" was "whether West was paid less than the full accrued benefit due him under the AK Steel Plan." *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 484 F.3d 395, 405 (6th Cir. 2007), *rehearing en banc denied*, No. 06-3442, 2007 U.S. App. LEXIS 20447 (6th Cir. Aug. 8, 2007) [Petitioner's Appendix at 17a].

AK Steel further asserts that its plan administrator had a "reasonable interpretation" of the Plan's "accrued benefit" provision, *see* Petition at 22, and characterizes the Sixth Circuit's decision as holding that "a court may apply the rule of *contra proferentem* to override a plan administrator's reasonable

interpretation." Petition at Questions Presented. These assertions are the premise for AK Steel's argument that this case presents a "circuit split" on the use of contra proferentum in interpreting ERISA plans. In fact, the plan administrator testified he had never considered the "accrued benefit" definition for any purpose, and didn't even know why it was in the Plan:

> Q. ... Do you know of any purpose that this Section 1.2 accrued benefit definition is actually used for by the plan?
>
> A. I don't – I don't even see it mentioned in the rest of the plan. The only reason I can guess at is that there is some statutory reason, some type of testing that's done within the framework of the IRS that requires this definition to be defined. But in administration of the plan, we don't turn to this definition for any reason.

Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170.

Other inaccurate statements in AK Steel's Petition are addressed in the Argument below.

ARGUMENT

This is an action brought by plan participants to recover benefits due under the terms of the AK Steel Pension Plan. The retirees received lump-sum distributions of their pension benefits between 1995 and 2005. The chief judge of the district court, and a

unanimous panel of the Sixth Circuit, found the distributions were less than the retirees' "accrued benefit" as defined in the Plan, and ordered relief in the amount of the underpayments. Petitioner's Appendix at 1a–33a and 36a–71a. On AK Steel's motion for rehearing *en banc*, no appellate judge voted to grant rehearing. Petitioner's Appendix at 34a-35a.

The Sixth Circuit's decision is in accord with the decisions of this Court and of the other circuits. There are no conflicts, nor any other reason for review by this Court.

I. THE DECISION BELOW INVOLVED A CLAIM FOR BENEFITS DUE UNDER THE PLAN

This case does not involve a claim for "statutory violation of ERISA," as AK Steel contends. *See* Petition at 1. Rather, as the district court and the Sixth Circuit both found, this case involves a claim for benefits due under the terms of the AK Steel Plan—specifically, the "accrued benefit" defined in Section 1.2 of the Plan. *See* Petitioners' Appendix at 76a. The decision below—finding that the benefits paid were less than the retirees' Plan-defined "accrued benefit"—was based on core principles of ERISA recognized by this Court, and uniformly applied by the circuit courts.

A. ERISA Protects the "Accrued Benefit" Defined by the Plan

As this Court discussed in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), "[n]othing in ERISA requires employers to establish employee

benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits .... [W]hen Congress enacted ERISA, it 'wanted to ... mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Heinz*, 541 U.S. at 743 (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980))).

ERISA permits a defined benefit plan, such as the AK Steel Plan, to define the "accrued benefit"[1] employees will receive, but then requires the plan to pay the full value of that benefit at retirement. Thus, ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), "rather circularly defines 'accrued benefit' as 'the individual's accrued benefit determined under the plan,'" *Heinz*, 541 U.S. at 744, while ERISA § 203(a)(2)(A), 29 U.S.C.

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[1] Technically two terms come into play, the "normal benefit" and the "accrued benefit." The "normal benefit" is "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age [i.e., 65]." ERISA § 3(22), 29 U.S.C. § 1002(22). The "accrued benefit" is defined in terms of the "normal benefit." It is "the portion of the normal retirement benefit which the participant has earned at any point while participating in a defined benefit plan." *Berger v. Xerox Ret. Income Guar. Plan*, 157 F. Supp. 2d 998, 1006 (S.D. Ill. 2001), *aff'd sub nom. Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003) (citing ERISA §§ 3(23)(A), 3(35), 29 U.S.C. § 1002(23)(A), (35)).

§ 1053(a)(2)(A), requires that the "accrued benefit" be "nonforfeitable" so "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." In *Heinz*, this Court held that the nonforfeitability requirement of ERISA § 203(a) is "a global directive that regulates the substantive content of pension plans; it adds a mandatory term to all retirement packages that a company might offer." *Heinz*, 541 U.S. at 750.

B. Benefits Paid in the Lump Sum Form Must Be Actuarially Equivalent to the Plan's "Accrued Benefit"

The "accrued benefit" in a defined benefit plan means "the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit [i.e., an annuity] commencing at normal retirement age [i.e., age 65]." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999) (the "accrued benefit" "[ordinarily is] expressed in the form of an annual benefit commencing at normal retirement age") (quoting ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)).

Section 204(c)(3), in turn, provides that "if an employee's accrued benefit is to be determined as an amount *other than* an annual benefit commencing at normal retirement age, ... [then] the employee's accrued benefit ... *shall be the actuarial equivalent*" of the annuity commencing at normal retirement age.

ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) (emphasis added).[2]

In *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), *cert. dism'd*, 531 U.S. 1061 (2001), the Second Circuit explained this statutory mechanism for protecting the value of participants' accrued benefits:

> What these provisions mean in less technical language is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (*e.g.*, on termination rather than retirement) or in any other form (*e.g.*, a lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.

Esden, 229 F.3d at 163. *Accord*, *Costantino v. TRW, Inc.*, 13 F.3d 969, 977-80 (6th Cir. 1994); *Lyons v. Georgia Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1242-52 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001); *Rybarczyk v. TRW Inc.*, 235 F.3d 975, 978-84 (6th Cir. 2001); *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 769-62 (7th Cir. 2003). *See Stephens v. Retirement Income Plan for Pilots of U.S. Air, Inc.*, 464 F.3d 606, 614 (6th Cir. 2006); *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 640 (7th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 1143 (2007); *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464

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[2] These rules are mirrored in parallel provisions of the Internal Revenue Code, I.R.C. § 411(a)(7) and § 411(c)(3).

F.3d 871, 874-76 (9th Cir. 2006), *cert. denied sub. nom. Xerox Corp. Retirement Income Guarantee Plan v. Miller*, __ U.S. __, 127 S. Ct. 1829 (2007).

C. Cash Balance Plans Must Comply With the Actuarial Equivalence and Nonforfeiture Requirements

A "cash balance plan" is a defined benefit plan[3] in which the pension benefit is calculated in reference to a hypothetical "account balance" that increases over time as a result of employer contributions and interest credits at a rate specified by the plan. *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 484 F.3d 395, 399 (6th Cir. 2007), *rehearing en banc denied*, No. 06-3442, 2007 U.S. App. LEXIS 20447 (6th Cir. Aug. 8, 2007) [Petitioner's Appendix at 3a–4a].

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[3] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). Discussing "the difference between defined contribution plans and defined benefit plans," the Court observed that "[a] defined benefit plan ... consists of a general pool of assets rather than individual dedicated accounts.'" *Hughes Aircraft*, 525 U.S. at 439 (quoting *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 154 (1993)). Thus, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool. Instead, members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.* The AK Steel Plan is a pension plan in which "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." The Plan expressly provides that participants' accounts are hypothetical and do not create property rights to certain funds or assets. Plan § 1.1. *See* Petitioners' Appendix at 75a–76a.

Because they are defined benefit plans, cash balance plans' "accrued benefit" is never the account balance as such, but rather the annuity commencing at age 65 to which the participant is entitled under the plan. Any lump sum distribution must be the actuarial equivalent of that "accrued benefit." *West*, 484 F.3d at 407-08 (citing *Esden*, 229 F.3d at 163; *Berger*, 338 F.3d at 757-58; ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3)) [Petitioners' Appendix at 22a–24a].

In 1996, the Internal Revenue Service instructed cash balance plans that they must use a two-step process in issuing lump sum distributions, first determining the annuity payable at age 65 to which the participant is entitled under the plan, and then calculating the actuarial equivalent of that annuity in current dollars. Thus, "the balance of the employee's hypothetical account must be projected to normal retirement age [and converted into an annuity] and then the employee must be paid at least the present value" of that projected age-65 annuity. Notice 96-8, 1996-1 C.B. at 360 (Part III. A), *quoted in Esden*, 229 F.3d at 166-67.

To satisfy the actuarial equivalence requirement and avoid forfeitures of plan benefits, the "projection-forward" step must take into account the interest credits on the participant's account to age 65, using the plan's stated interest credit rate. The reason can be illustrated in practical terms. A participant retires at age 55 with $50,000 in her hypothetical account. The annuity to which she is entitled commencing at age 65 is calculated, not from her $50,000 current balance, but rather from the much larger balance she

will have at age 65, after an additional 10 years of interest has accrued at the interest credit rate specified in the plan. If the plan provides participants with a favorable interest credit rate (AK Steel's plan provides a minimum of 7.5% per year on participants' Opening Accounts), then the age-65 annuity that is her "accrued benefit" is more valuable in current dollars than simply the current balance of her account. *Esden*, 229 F.3d at 159 ("If the plan's projection rate exceeds the statutory discount rate, then the present value of the accrued benefit will exceed the participant's account balance").

Notice 96-8 requires that this value be taken into account. "[I]n determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of [Treas. Reg. §] 1.411(a)-4T, will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits." Notice 96-8, 1996-1 C.B. at 360 (Part III. A), *quoted in Esden*, 229 F.3d at 166-67. A more recent IRS notice, issued after the enactment of the Pension Protection Act of 2006, reaffirms the authority of Notice 96-8 for pre-Act distributions, and reiterates the IRS's admonition against forfeiture. Notice 2007-6, Part II, Para. 12 (I.R.B. 2007-3).

Every circuit to have considered the question has ruled that making retirees forgo interest credits to receive lump sum distributions violates the actuarial equivalence and nonforfeitability requirements:

> Xerox tells its employees who leave the company before they reach [normal retirement age] that if they leave their money with the company they will obtain a pension beginning at age 65 that will reflect future interest credits. They are offered the alternative of taking a lump sum now in lieu of a pension later, but the lump sum is not the prescribed actuarial equivalent of the pension that they are invited to surrender by accepting the lump sum because it excludes those credits.

Berger, 338 F.3d at 761-762. *Accord*, *Esden*, 229 F.2d at 167; *Miller*, 464 F.3d at 874-76.

D. The Courts Below Found That AK Steel's Retirees Did Not Receive the "Accrued Benefit" Defined in the Plan

The court of appeals found that this case is "indistinguishable from *Esden* and *Berger*" because the Plan failed to pay the "accrued benefit" defined in Section 1.2 of the Plan. *West*, 484 F.3d at 409 [Petitioner's Appendix at 26a]. Section 1.2 defines the "accrued benefit" as the "single life annuity commencing on a Participant's Normal Retirement Date ... that is the Actuarial Equivalent of the Participant's current Account," and provides that "the Account is projected to Normal Retirement Date and converted to a single life annuity." *See* Petitioners' Appendix at 76a. If performed in accordance with ERISA, these required calculations would have taken into account the interest credits to age 65, which the Plan sets at a minimum 7.5% per year on participants' Opening Accounts. *West*, 484 F.3d at 399, 400

[Petitioners' Appendix at 4a, 7a]. However, AK Steel failed to make any of the required calculations. Instead, pursuant to Section 4.1 of the Plan, a participant who elected a lump sum distribution received an amount "equal to his Accounts." *West*, 484 F.3d at 409 (citing Section 4.1 of the Plan) [Petitioners' Appendix at 26a]. Thus, the lump sum distributions were not actuarially equivalent to the participants' "accrued benefit," and the retirees forfeited the value of their interest credit rights under the Plan in order to receive the distributions. The Sixth Circuit found that:

> What happened here is exactly what happened in *Berger*—West was required to "sell" his pension entitlement back to AK Steel at a discount in order to receive his lump-sum payout.

West, 484 F.3d at 409 (citing *Berger*, 338 F.3d at 762) [Petitioners' Appendix at 26a–27a].[4]

Stating that "we agree with the analysis of our sister circuits and with that of the district court below," the Sixth Circuit concluded that:

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[4] AK Steel now contends that its plan administrator had a "reasonable interpretation" of Section 1.2, but the plan administrator admitted he had never considered the Plan's "accrued benefit" definition for any purpose, and didn't know why it was there. Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170 ("in administration of the plan, we don't turn to this definition for any reason").

> "Any distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of [the normal retirement] benefit." *Esden*, 229 F.3d at 159. And as discussed above, the normal retirement benefit [under the AK Steel Plan] is "a single-life annuity payable at normal retirement age." *Id.*; *see also* AK Steel Plan § 1.2. AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles.

West, 484 F.3d at 409 [Petitioners' Appendix at 27a].

II. NO CONFLICT IS PRESENTED ON THE SCOPE OF ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)

AK Steel contends that the Sixth Circuit's opinion is in conflict with other decisions involving the scope of one of ERISA's enforcement sections, ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This alleged conflict is premised on AK Steel's mischaracterization of this case as involving a "statutory violation of ERISA." *See* Petition at 1. In fact, the courts below properly found that this case involves a claim for "benefits due under the plan," actionable under § 502(a)(1)(B). That finding is in accord with decisions of this Court, and no conflict is presented.

A. The Decision Below Is in Accord With Holdings of This Court on the Scope of ERISA § 502(a)(1)(B)

To the Sixth Circuit, the "key issue" was "whether West was paid less than the full accrued benefit due him under the AK Steel Plan." *West*, 484 F.3d at 405 [Petitioners' Appendix at 17a]. The court of appeals answered that question in the negative, affirming the finding of the district court that the retirees' lump sum distributions did not equal the "accrued benefit" defined in Section 1.2 of the Plan.

It necessarily followed that AK Steel's failure to distribute the "accrued benefit" defined in the Plan was actionable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). *See West*, 484 F.3d at 404–05 [Petitioners' Appendix at 14a–18a]. Indeed, § 502(a)(1)(B) expressly authorizes such a claim, stating that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

AK Steel relies on Section 4.1 of the Plan, which provides that a retiree who elects the lump sum form of payment will receive only an amount "equal to his Account" (instead of the full "accrued benefit" defined in Section 1.2 of the Plan). *See* Petitioners' Appendix at 90a. Section 4.1 violates the core principle of ERISA that a lump sum distribution of pension benefits must equal the participant's "accrued benefit" as defined in the plan—a requirement "repeatedly recognized by courts." *Esden*, 229 F.3d at 162–65. Yet AK Steel

contends that, *because of* the illegal provision in Section 4.1, this case cannot proceed as a claim for "benefits due under the plan" pursuant to ERISA § 502(a)(1)(B). Of course, if that were true, any plan could deprive its participants of § 502(a)(1)(B)'s remedy for "benefits due" simply by stating that the plan's "accrued benefit" will not be paid.

In both the district court and the Sixth Circuit, "AK Steel argue[d] that *neither* prong of the ERISA enforcement scheme authorizes the relief that the plaintiffs seek," *West*, 484 F.3d at 402–03 [Petitioners' Appendix at 12a] (referring to § 502(a)(1)(B) and § 502(a)(3), the latter of which allows participants to bring a civil action "to enjoin any act or practice which violates" ERISA or "obtain other appropriate equitable relief") (emphasis added). AK Steel has now abandoned that position, allowing that there was "a potential avenue of relief." Petition at 18 n.7. According to AK Steel, the retirees "could have (1) sought an equitable reformation of the Plan under § 502(a)(3) to conform the Plan to the provisions of ERISA, and then (2) invoked § 502(a)(1)(B) to seek benefits due under the terms of the Plan as reformed." *Id.*

In the instant case, the retirees pleaded their claim under both § 502(a)(1)(B) and § 502(a)(3). *West*, 484 F.3d at 403 [Petitioners' Appendix at 11a] ("West's complaint tracks the language of both § 502(a)(1)(B) and § 502(a)(3)"). The district court considered both sections but found the retirees' claim for benefits could be determined under § 502(a)(1)(B)–a conclusion affirmed by the court of appeals. Order dated November 22, 2004 [Petitioner's Appendix at 65a-66a],

aff'd, *West*, 484 F.3d at 405 [Petitioner's Appendix at 17a].

The Sixth Circuit's holding that "§ 502(a)(1)(B) provides an appropriate remedy," *id.* [Petitioner's Appendix at 17a], is in accordance with this Court's opinion in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Knudson*, this Court emphasized that, while plan *fiduciaries* are limited to certain equitable remedies under § 502(a)(3), "Congress authorized 'a participant or beneficiary' to bring a civil action 'to enforce his rights under the terms of the plan' [pursuant to § 502(a)(1)(B)], *without reference to whether the relief sought is legal or equitable*." *Id.* at 221 (emphasis added).

Section 502(a)(1)(B), the Court has observed, "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims, ... one that runs directly to the injured beneficiary." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). Those breaches of duty are not limited to violations of plan terms, as AK Steel contends, but include the requirements imposed on plans by ERISA. ERISA's fiduciary duty section, § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), expressly subordinates plan provisions to ERISA's requirements, providing that the plan administrator "shall discharge his duties with respect to a plan ... in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this title and title IV*."

The "accrued benefit" protected by ERISA is always "determined under the plan." ERISA § 3(23)(A), 29

U.S.C. § 1002(23)(A), *discussed in Heinz*, 541 U.S. at 744. Because "ERISA [does not] mandate what kind of benefits employers must provide," *Heinz*, 541 U.S. at 743, "[o]nly the words of the Plan itself can create an entitlement to benefits." *Hein v. Federal Deposit Insurance Corp.*, 88 F.3d 210, 215 (3d Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997). Once a plan defines its "accrued benefit," however, ERISA prescribes regulatory requirements "to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). One such protection is ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A), which requires that the "accrued benefit" defined by the plan be "nonforfeitable." This statutory requirement "adds a mandatory term to all retirement packages that a company might offer." *Heinz*, 541 U.S. at 750. *Accord*, *Page v. Pension Ben. Guaranty Corp.*, 968 F.2d 1310, 1314 (D.C. Cir. 1992) (opinion by Ginsburg, J.) (minimum vesting standards established by ERISA must either be immediately adopted by pension plans or become "implied 'terms of the plan'" for purposes of ERISA's nonforfeitability provision) (quoting *Rettig v. Pension Ben. Guaranty Corp.*, 744 F.2d 133, 143 (D.C. Cir. 1984)); *May Dept. Stores Co. v. Federal Insurance Co.*, 305 F.3d 597, 602 (7th Cir. 2002) (ERISA's statutory requirements constitute terms of the plan implied by law).

Thus, under decisions of this Court, a claim for the "accrued benefit" defined in a plan, calculated in accordance with the requirements of ERISA, is a claim for "benefits due under the terms of the plan" within the scope of ERISA § 502(a)(1)(B). The decision below faithfully adheres to this Court's holdings.

B. The Decision Below Does Not Conflict With Decisions of Other Circuits

The decision below is not in conflict with decisions of other circuits. The Eighth Circuit case of *Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), *cert. denied sub nom. Ross v. Rail Car America, Inc.*, 537 U.S. 885 (2002), did not involve a claim for benefits due under the terms of the plan or the requirements of ERISA. Indeed, the plan itself, which "is ordinarily liable for benefits payable under the terms of the plan and is thus the primary defendant in a section 502(a)(1)B) action," was "merely a nominal defendant." *Ross*, 285 F.3d at 740 (internal quotation marks omitted). The case actually involved an employee's attempt to set aside two amendments of the plan that "shortened the duration of his benefits" and "reduced the amount of his monthly payment,"on the ground that the amendments were not signed by the plan administrator. The Eighth Circuit affirmed the grant of summary judgment against the employee "because the 1990 and 1991 amendments were validly enacted." *Ross*, 285 F.3d at 743.

The First Circuit case of *Todisco v. Verizon Communications, Inc.*, 497 F.3d 95 (1st Cir. 2007), was not a claim for benefits at all. Rather, the plaintiff, a widowed spouse, sought "compensatory monetary damages, because of Verizon's failure to honor the oral representation it made to her husband that he did not need to submit a statement of current health in order to obtain supplemental life insurance." *Todisco*, 497 F.3d at 100.

In *Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001), *cert. denied*, 534 U.S. 995 (2001), the Fifth Circuit merely affirmed the district court's decision without opinion. The district court had awarded "underpayments" to plan participants so they would be "placed in basically the same financial position" they would have been in if the plan "had complied with ... the accrual and vesting provisions of ERISA." *Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 770-71 (D. Tex. 2000), *aff'd without opinion*, 252 F.3d 721 (5th Cir. 2001), *cert. denied*, 534 U.S. 995 (2001).

None of these cases conflict with the Sixth Circuit's decision in the instant case, or present a "circuit split" on the scope of ERISA § 502(a)(1)(B).

C. The Decision Below Does Not Conflict With ERISA's Regulatory Scheme

Nor does the decision below conflict with ERISA's "uniform regulatory scheme." Petition at 19 (quoting *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004)). AK Steel contends that ERISA provisions cannot be considered in deciding claims for benefits under § 502(a)(1)(B), because then state courts, which have concurrent jurisdiction in such cases, could apply federal law. AK Steel's argument is based solely on a statement in a 1974 Congressional report suggesting that claims for benefits "do not involve application" of ERISA's provisions. Petition at 6. However, that statement "does not mesh with the plain language" of § 502(a)(1)(B), inasmuch as the statute, "[b]y its own terms, ... broadly covers any action to recover, enforce, or clarify benefits, without regard to which ERISA

provisions must be applied during the action." *Board of Trustees of Laborers Pension Trust Fund v. Levingston*, 816 F. Supp. 1496, 1500 (N.D. Cal. 1993). *Accord*, *In Re Marriage of Oddino*, 16 Cal.4th 67, 78, 939 P.2d 1266, 1273 (1997), *cert. denied*, 523 U.S. 1021 (1998) ("Congress did not in ERISA limit state court jurisdiction to actions in which the provisions of title I of ERISA have no application").

Both federal and state courts properly consider ERISA requirements in deciding benefit claims under § 502(a)(1)(B). "[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507 (1962). In *Oddino, supra*, the Plan contended that a divorced spouse's claim for benefits would involve "interpretation of ERISA's QDRO provisions" and so could not be decided by a state court pursuant to § 502(a)(1)(B). *Oddino*, 16 Cal.4th at 77, 939 P.2d at 1272. Like AK Steel, the plan argued that "exclusive federal jurisdiction is necessary to allow development of a consistent federal common law of rights and obligations under ERISA-regulated plans." *Id.* at 79–80, 939 P.2d at 1274. Quoting federal authority, the California Supreme Court disagreed: "Congress's choice to vest jurisdiction over one class of ERISA civil actions in both the state and federal courts is in no way inconsistent with its intent to create a comprehensive scheme of federal common law in the area. State as well as federal courts may be expositors of federal law." *Id.* at 80, 939 P.2d at 1274 (quoting *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1500, n.2 (9th Cir. 1983)).

III. NO BONA FIDE ISSUE IS PRESENTED ON THE DOCTRINE OF CONTRA PROFERENTUM

A. Consideration of the Contra Proferentum Doctrine Would Not Affect The Outcome of This Case

The decision below turned on Section 1.2 of the AK Steel Plan, which defined the Plan's "accrued benefit" as "a single life annuity commencing on a Participant's Normal Retirement Date" and triggered ERISA's requirement that "[a]ny distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent" of the Plan's "accrued benefit." *West*, 484 F.3d at 409 (quoting *Esden*, 229 F.3d at 159) (parenthetical phrase by the *Esden* court) [Petitioner's Appendix at 27a]. What remained was to address the lump sum provision in Section 4.1 of the Plan, which said that a participant who elected a lump sum distribution received an amount "equal to his Accounts." *See* Petitioners' Appendix at 90a. As AK Steel concedes in its Petition, this provision "expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity." Petition at 8 (emphasis by AK Steel).

The Sixth Circuit dealt with Section 4.1 by invoking the contra proferentum doctrine: "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with the definition of 'accrued benefit' in another section of the Plan, the ambiguity must be resolved in the plaintiffs' favor." *West*, 484 F.3d at 409 [Petitioners' Appendix at 27a]. The court could simply have said that Section

4.1 is void for illegality. But either way, no "reasonable interpretation" by AK Steel could white-wash a plan provision which "expressly states that lump sum payments shall *not* be calculated as the actuarial equivalent of an employee's age-65 annuity" as ERISA requires.[5] Petition at 8 (emphasis by AK Steel). *See West*, 484 F.3d at 409 [Petitioners' Appendix at 26a–27a] ("AK Steel's complicated interpretations of the relevant statutes and regulations do not, in our view, refute these basic legal principles").

No plan administrator has discretion to interpret the terms of the plan in a way that violates the requirements of ERISA. *See, e.g., Janssen v.*

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[5] AK Steel's claim that its plan administrator had a "reasonable interpretation" of the Plan is belied by the evidence. The plan administrator admitted he had never considered the Plan's "accrued benefit" definition for any purpose and didn't even know why it was there:

> Q. ... Do you know of any purpose that this Section 1.2 accrued benefit definition is actually used for by the plan?
>
> A. I don't – I don't even see it mentioned in the rest of the plan. The only reason I can guess at is that there is some statutory reason, some type of testing that's done within the framework of the IRS that requires this definition to be defined. But in administration of the plan, we don't turn to this definition for any reason.

Deposition of Richard Ford, AK Steel's Corporate Manager of Benefits, at 83, C.A. App. 170.

Minneapolis Auto Dealers Benefit Fund, 447 F.3d 1109, 1114 (8th Cir. 2006) (one factor "[t]o determine if a plan administrator's interpretation of a plan is reasonable" is "whether the interpretation conflicts with the substantive or procedural requirements of ERISA") (citing *Finley v. Special Agents Mut. Benefit Ass'n*, 957 F.2d 617, 621 (8th Cir. 1992)); *Fagan v. National Stabilization Agreement of the Sheet Metal Industry Trust Fund*, 60 F.3d 175, 180 (4th Cir. 1995) (one factor in determining reasonableness of administrator's interpretation of plan terms is "whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA itself") (quoting *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989)); *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 428 (4th Cir. 1990) (rejecting plan administrator's interpretation of plan terms because "[the administrator's] interpretation of the Plan might lead to forfeiture of vested rights to retirement benefits" in violation of ERISA § 203(a), 29 U.S.C. § 1053(a)). *Cf. Wagener v. SBC Pension Benefit Plan*, 407 F.3d 395, 403 (D.C. Cir. 2005) ("An interpretation of the Plan that rests on impermissible discrimination is clearly unreasonable and, therefore, it fails whether we apply *de novo* review or a deferential standard of review").

Thus, even if the Sixth Circuit's discussion of contra proferentum in reference to Section 4.1 of the Plan were misplaced, it would not affect the conclusion of the court of appeals that plaintiffs' lump sum distributions had to be actuarially equivalent to the "accrued benefit" defined by the Plan in Section 1.2. Indeed, the outcome would not have changed one whit if contra proferentum had never been mentioned.

B. There is No "Circuit Split" on Contra Proferentum

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that a denial of benefits claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case an abuse of discretion standard applies. 489 U.S. at 115. The Court added that, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts § 187, Comment *d* (1959)).

AK Steel contends there is a "circuit split" on the application of *Firestone*'s holdings by the circuit courts, involving the use of the contra proferentum doctrine in abuse of discretion cases. Petition at 23-27. According to AK Steel, four circuits reject any use of contra proferentum in such cases, while two circuits permit the doctrine to be used and two other circuits adopt a hybrid approach. *Id.* Contrary to AK Steel's contention, however, there is no conflict warranting review by this Court.

The hybrid approach of the Fifth Circuit determines "the legally correct interpretation under the doctrine of *contra proferentem*," *Spacek v. Maritime Assoc.*, 134 F.3d 283, 298 (5th Cir. 1998), and if it is not, decides "whether the administrator's decision was

an abuse of discretion." *Spacek*, 184 F.3d at 292, 298 n.14; *Rhorer v. Raytheon Engineers & Constructors, Inc.*, 181 F.3d 634, 642 (5th Cir. 1999). AK Steel contends that this conflicts with decisions like *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999), in which the Tenth Circuit held that "the doctrine of contra proferentem is inapplicable" in abuse of discretion cases. Yet the Tenth Circuit itself saw no such conflict in *Kimber*. Discussing the Fifth Circuit's hybrid approach in *Spacek* and *Rhorer*, the Tenth Circuit found that "[s]ince this approach merely melds contra proferentem into the required discretionary review, we do not view it as conflicting with our decision today." *Kimber*, 196 F. 3d at 1101.

AK Steel further errs when it contends that the Sixth Circuit's use of contra proferentum overrides plan administrator discretion. Sixth Circuit jurisprudence embraces *Firestone*'s requirement of deference. In *Graham v. Western Kentucky Navigation, Inc.*, No. 99-5708, 2000 U.S. App. LEXIS 22250 (6th Cir. Aug. 23, 2000), Circuit Judge R. Guy Cole, Jr., one of the panel members in the instant case, wrote that "[a]n arbitrary and capricious standard of review is 'highly deferential' to the decision of the party making the benefits determination. To meet this standard, the reviewing court need only find that the decision to deny benefits was 'rational in light of the plan's provisions.'" 2000 U.S. App. LEXIS 22250 at *4 (citation omitted) (quoting *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 380 (6th Cir. 1996)).

The Sixth Circuit has never held that contra proferentum can override a reasonable exercise of

administrator discretion. *See Mitchell v. Dialysis Clinic, Inc.*, 18 Fed. Appx. 349, 2001 U.S. App. LEXIS 19439 (6th Cir. Aug. 24, 2001). In *Mitchell*, the plaintiffs cited "cases from this Circuit that they claim have reduced the deference given to an administrator's decision through the use of state principles of contract interpretation," specifically contra proferentum. *Mitchell*, 18 Fed. Appx. at 353. Dissecting the references to contra proferentum in those cases, the Sixth Circuit concluded that "[w]e do not believe that through these statements this Circuit has established a rule of interpretation that would completely contradict the deference paid to an administrator's decision." *Mitchell*, 18 Fed. Appx. at 352-54 (discussing *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc); *University Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000); *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000)).

For example, although *Perez* had referred to the contra proferentum doctrine, "that language does not hold that the *Perez* court was suggesting that the rule of interpretation is to be used in ERISA cases when the standard of review is arbitrary and capricious." *Mitchell*, 18 Fed. Appx. at 353. Indeed, *Perez* concluded that "[b]ecause the only reasonable interpretation of the Plan concludes that *it vests discretion* in Aetna to make benefit determinations, Perez's *contra proferentum* argument lacks merit." *Id.* (quoting *Perez*, 150 F.3d at 557 & n.7). Similarly, contra proferentum was mentioned in *University Hospitals* and *Copeland Oaks*, *supra*, but was not dispositive in either case. *See Mitchell*, 18 Fed. Appx. at 354.

Sixth Circuit decisions before and after *Mitchell* have declined to apply contra proferentum where the plan administrator was empowered to interpret plan terms, and instead deferred to administrator discretion. *See Graham v. Western Kentucky Navigation, Inc.*, No. 99-5708, 2000 U.S. App. LEXIS 22250 at *7-8 (6th Cir. Aug. 23, 2000); *Marquette General Hosp. v. Goodman Forest Industries*, 315 F.3d 629, 632-33 (6th Cir. 2003); *Ziegler v. HRB Management, Inc.*, 182 Fed. Appx. 405, 408, 2006 U.S. App. LEXIS 11905 at *9-10 (6th Cir. May 9, 2006). Many other Sixth Circuit decisions defer to administrator discretion without even considering contra proferentum. *Lennon v. Metropolitan Life Ins. Co.*, 504 F.3d 617 (6th Cir. 2007); *Osborne v. Hartford Life and Accident Ins. Co.*, 465 F.3d 296 (6th Cir. 2006), *cert. denied*, __ U.S. __, 128 S. Ct. 46 (2007); *Belluardo v. Cox Enterprises, Inc. Pension Plan*, 157 Fed. Appx. 823, 2005 U.S. App. LEXIS 24975 (6th Cir. Nov. 8, 2005); *Gismondi v. United Technologies Corp.*, 408 F.3d 295 (6th Cir. 2005).

The other circuit on which AK Steel relies for its "circuit split" is the Fourth, but there, too, the cases cited by AK Steel fail to exhibit the alleged conflict. *Carolina Care Plan, Inc. v. McKenzie*, 467 F.3d 383 (4th Cir. 2006), *cert. dismissed*, __ U.S. __, 128 S. Ct. 6 (2007); *McKeldin v. Reliance Standard Life Ins. Co.*, No. 06-1743, 2007 U.S. App. LEXIS 24289 (4th Cir. Oct. 17, 2007). In *Carolina Care Plan*, contra proferentum was only the last of several factors analyzed by the court, and it did not override any other factor. Rather, it was only because the plan administrator's interpretation failed under the factors previously considered by the court that contra

proferentum was even reached. 467 F.3d at 387-89. In *McKeldin*, the court mentioned contra proferentum but never applied it, and ultimately upheld the plan administrator's interpretation as a proper exercise of discretion. 2007 U.S. App. LEXIS 24289 at *8-12.

CONCLUSION

The Sixth Circuit's decision in the instant case is not in conflict with decisions of other circuit courts of appeals, either on the scope of relief afforded by ERISA §§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), or on the applicability of contra proferentum in interpreting a pension plan. Therefore, AK Steel's petition for a writ of certiorari should be denied.

Respectfully Submitted,

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